UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON

CIVIL ACTION #

Jeffrey Warren Spinney
Petitioner,

V.

United States of America
(AUSA: Timothy Feely, &
USA: Michael J. Sullivan)
Respondents.

Petitioner: Jeffrey Warren Spinney's
Motion Via: Federal Rules of Civil Procedure
Rule 60(b)(6)
With Supportive Appendix & Exhibits

Respectfully Submitted By
Petitioner/Claimant/Affiant:

Jeffrey Warren Spinney

Jeffrey Warren Spinney
15468-018
FCI McKean
P.O. Box 8000
Bradford, Pennsylvania
16701

("Pro Per In Propria
Persona Proceeding
Sui Juris")

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
BOSTON

Jeffrey Warren Spinney Petitioner, v. United States of America (AUSA: Timothy Feely, & USA: Michael J. Sullivan) Respondents.	Criminal Action #93-10345-DPW. Civil Action #_____. Honorable: Douglas P. Woodlock, U.S. District Court Judge (D.Mass/Boston).

MOTION BY JEFFREY WARREN SPINNEY FOR RELIEF FROM JUDGMENT VIA: FEDERAL RULES OF CIVIL PROCEDURE RULE 60(b)(6)

COMES NOW, Jeffrey Warren Spinney, Pro Per In Propria Persona Proceeding Sui Juris, in the above captioned case & titled motion/claim/affidavit, pursuant to (Federal Rules of Civil Procedure Rule 60(b)(6), hereinafter referred to as 'FRCP 60(b)(6)'), respectfully moves this Honorable Court for relief from the effect of the Order entered by this Court on: **7-8-94 & 9-9-96**, Sentence & Judgment of Petitioner: Spinney, sentenced to: **262 months**, via: Aiding & Abetting 18 U.S.C. §2, even-though Spinney's indictment did not return a True Bill via: Title 18 U.S.C. §2, Aiding & abetting, indictment, in violations of United States Supreme Court Case Law Authority: Stirone v. United States, 361 U.S. 212, 4 L.Ed.2d 252, 80 S.Ct. 270 [No. 35] Argued: November 9, and 10, 1959; Decided: January 11, 1960, is law of the land case that has never been reversed. See EXHIBIT: U.S. v. Spinney, CR-93-10345-DPW, Appendix #**1-19** **(Indictment)**.

Petitioner, in the alternative moves this Court to otherwise strike the Procedurally & Factually Flawed Indictment, Conviction & Sentence of Petitioner: Spinney, (hereinafter referred to as 'Spinney') via: this Motion pursuant to FRCP 60(b)(6), and Memorandum filed which precipitated the Court Order Judgment & Conviction of Spinney.

JURISDICTION

If Spinney's claim of fraud upon the Court is deemed improperly filed pursuant to FRCP 60(b)(6), it may still be treated as a motion addressed to the inherent power of the Court to set aside a judgment procured by fraud upon the Court: United States v. Buck, 281 F.3d 1336, 1339 (10th Cir.2002). Also see: Newly decided United States Supreme Court: Gonzalez v. Crosby, No. 04-6432, On Writ of Certiorari To The United States Court Of Appeals For The Eleventh Circuit No. 04-6432. Argued: April 25, 2005; Decided: June 23, 2005. FRCP 60(b)(6), which permits a Court to relieve a party from the effect of a final judgment. Although the title "Motion to Alter or Amend Judgment" suggest--that petitioner was relying on FRCP 59(e), the substance of the motion made clear that petitioner sought relief under FRCP 60(b)(6).

AEDPA did not expressly circumscribe the operation of Rule 60(b). (By contrast, AEDPA directly amended other provisions of the Federal Rules. See, e.g., AEDPA, §103, 110 Stat. 1218 (amending Fed.R.A.P. 22)).

The new habeas restrictions by AEDPA are made indirectly relevant, however, by the fact that Rule 60(b), like the rest of the Rules of Civil Procedure, applies in habeas corpus proceedings under 28 U.S.C. §2254, only "to the extent that [it is] not inconsistent with" applicable federal statutory provisions and rules. 28 U.S.C. §2254 Rule 11; see Fed. Rule Civ. Proc. 81(a)(2). The relevant provisions of the AEDPA amended habeas statutes, 28 U.S.C. §§2244(b)(1)-(3), impose three requirements on second or successive habeas petitions: First, any claim that has already been adjudicated in a previous petition must be dismissed. §2244(b)(1). Second, any claim that has not already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law on new facts showing a high probability of "Actual Innocence." §2244(b)(2). Third, before the district court may accept a successive petition for filing, the court of appeals must determine that it presents a claim not previously raised that is sufficient to meet §2244(b)(2)'s new-rule or "Actual-Innocence" provisions. §2244(b)(3). In Spinney, supra, his lawyer was clearly ineffective for not raising the above issues: In some instances, a Rule 60(b) motion will contain one or more "claims." For example, it might straight-for wardly assert that owing to "excusable neglect," FRCP 60(b)(1), the movant's habeas petition had omitted a claim

of constitutional error, & seek leave to present that claim. Cf. Harris v. United States, 367 F.3d 74, 80-81 (CA2 2004) (petitioner's Rule 60(b) motion sought relief from judgment because habeas counsel had failed to raise a Sixth Amendment claim). Similarly, a motion might seek leave to present "newly discovered evidence," Fed. Rule Civ. Proc. 60(b)(2), in support of a claim previously denied. E.g., Rodwell v. Pepe, 324 F.3d 66, 69 (CA1 2003). Or a motion might contend that a subsequent change in substantive law is a "reason justifying relief," FRCP 60(b)(6), from previous denial of a claim. E.g., Dunlap v. Litscher, 301 F.3d 873, 976 (CA7 2002). Virtually every Court of Appeals to consider the question has held that such a pleading, although labeled a Rule 60(b) motion, is in substance a successive habeas petition & should be treated accordingly. E.g., Rodwell, supra, at 71-72; Dunlap, supra, at 876. FRAUD, on the federal habeas court is one example of such a defect. See generally: Rodriguez v. Mitchell, 252 F.3d 191, 199 (CA2 2001) (a witness's allegedly fraudulent basis for refusing to appear at a federal habeas hearing "relate[d] to the integrity of the federal habeas proceeding, not to the integrity of the state criminal trial"). We note that an attack based on the movant's own conduct, or his habeas counsel's omissions, se, e.g., supra, at 6, ordinarily does not go to the integrity of the proceedings,

but in effect askes for a second chance to have the merits determined favorably. Like the Court of Appeals, respondent relies heavily on our decision in: Calderon v. Thompson, 523 U.S. 538 (1998). In that case we reversed the Ninth Cicuit's decision to recall its mandate and reconsider the denial of Thompson's first federal habeas petition; the recall was, we held, an abuse of discretion because of its inconsistency with the policies embodied in AEDPA. Id., at 554-559. Analogizing an appellate court's recall of its mandate to a district court's grant of relief from judgment, the Eleventh Circuit thought that Calderon's disposition applied to Rule 60(b). 366 F.3d, at 1272-1277. We think otherwise.

> "To begin with, as the opinion said, compliance with the actual text of AEDPA's successive petition provision was not at issue in Calderon because the Court of Appeals considered only the claims &--evidence presented in Thompson's first federal habeas petition. 523 U.S., at 554. Calderon, did state, however, that "a prisoner's motion to recall the mandate on the basis of the merits of the underlying decision can be regarded as a second or successive application." Id., at 553 (emphasis added). But that is entirely consonant with the proposition that a Rule 60(b) motion that seeks to revist the federal court's denial on the merits of a claim for relief should be treated as a successive habeas petition. The problem for respondent is that this case does not present a revisitation of the merits. The motion here, like some Rule 60(b) motion in §2254 cases, confines itself not only to the first federal habeas petition, but to a nonmerits aspect of the first federal habeas proceeding. Nothing in Calderon, suggests that entertaining such a filing is "inconsistent with" AEDPA."

Rule 60(b) has unquestionably valid role to play in habeas cases. The Rule is often used to relieve parties from the effect of a default judgment mistakenly entered

against them. e.g., Klapprott, 335 U.S., at 615 (opinion of Black, J.), a function as legitimate in habeas cases as in run-of-the-mine civil cases. The Rule also preserves parties' opportunity to obtain vacatur of a judgment that is void for lack of subject-matter jurisdiction--a consideration just as valid in habeas cases as in any other, since absence of jurisdiction altogether deprives a federal court of the power to adjudicate the rights of the parties. Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 94, 101 (1998). In some instances, we may note, it is the State, not the habeas petitioner, that seeks to use Rule 60(b), to reopen a habeas judgment granting the writ. See, e.g., Ritter v. Smith, 811 F.2d 1398, 1400 (CA11 1987). A change in the interpretation of a Substantive Statute may have consequences for case that have already reached final judgment, particularly in the criminal context. See Bousley v. United States, 523 U.S. 614, 619-621 (1998); cf. Fiore v. White, 531 U.S. 225, 228-229 (2001) (per curiam).

Justice Breyer, concurring:

> The majority explains that a proper Rule 60(b) motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some "DEFECT" in the integrity of the federal habeas proceedings."

While this type of supervening change in procedural law may not alone warrant the reopening of a habeas judgment, there may be special factors that allow a prisoner

to satisfy the high standard of Rule 60(b)(6). For instance, when a prisoner has shown reasonable diligence in seeking relief on a change in procedural law, & when that prisoner can show that there is probable merit to his underlying claims, it would be well in keeping with a district court's discretion under Rule 60(b)(6) for that court to reopen the habeas judgment & give the prisoner the one fair shot at habeas review that Congress intended that he have. After all, we have consistently recognized that Rule 60(b)(6) "provides courts with authority 'adequate to enable them to Vacate Judgment whenever such action is appropriate to accomplish justice.'" Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 864 (1988) (quoting: Klapprott v. United States, 335 U.S. 601, 614-615 (1949)). Here in Gonzales, the U.S. Supreme Court stated: who is serving a 99-year term in Florida prison, filed his Rule 60(b) motion approximately eight months after this Court's decision in Artuz v. Bennett, 531 U.S. 4. A district court could reasonably conclude that this period reveals no lack of diligence on the part of an incarcerated Pro Se litigant. NOTE: FRCP Rule 60(b)(6) contains NO specific time limitation on filing, it is worth noting that petitioner filed his motion via: FRCP Rule 60(b)(6), in Spinney, supra. And while we have received scant briefing on the probable merit of his

petition, his allegation--that his guilty plea was not knowing & voluntary because it was based on grossly inaccurate advice about the actual time he would serve in prison--at least states a colorable claim of a constitutional violation. See: Finch v. Vaughn, 67 F.3d 909 (CALl 1995); see also Mabry v. Johnson, 467 U.S. 504 (1984).

PROCEDURAL ISSUES

Arguably, the sole claim for relief in this instance is the fraud perpetrated in the Court through the actions of an individual, whom represents the United States: AUSA: Timothy Feely, by NOT indicting defendant: Spinney under Title 18 U.S.C. §2, Aiding & Abetting Statute, & in the very same breath, charging the Jury & ultimately convicting Spinney and Sentencing Mr. Spinney to well over twenty (20) years of incarceration, in violations of Stirone, supra, Due Process, Equal Protection of the Law & 1st, 5th, 6th, 7th, 8th, & 14th Amendment(s) of the United States Constitution, etc. Through AUSA: Feely's fraudulent, illegal & criminal acts, he placed the Court, Clerk of Courts & jury in a position of performing acts that were adverse to existing procedural rules governing the Federal Grand Jury, & Mr. Spinney's Due Process, & Jury Trial Rights under the Seventh Amendment of the U.S. Constitution. FRCP 60(b)(6), permits relief "for any other reason justifying relief from the operation of the judgment." In all candor, Spinney submits that reliance by him on that provision

because the clear important of the language of clause FRCP 60(b)(6) is that the clause is restricted to reasons other than those enumerated in the previous five clauses. See Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 863 n.11, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988); See also: 12 James Wm. Moore, et al., Moore's Federal Practice §60.48 at 60-167 (3d ed.1997) (Moore's); 11 Charles Alan Wright, et al., Federal Practice and Procedure §2864, at 362 (2d ed.1995) (Wright & Miller). Because fraud is one of the reasons for relief appearing in Clause (3), it is not available as "any other reason" under Clause (6). Spinney concedes he cannot avoid the time restriction under Clause (3). Nevertheless, FRCP 60(b) authorizes two other avenues for relief from the fraud upon the Court. The Rule states that it "does not limit the power of a Court (1) to entertain an independent action to relieve a party from a judgment, order, or proceeding...or (2) to set aside a judgment for fraud upon the Court." FRCP 60(b); See: 12 Moore's §60.81 [1][b] (distinguishing between an independent action & the Inherent Power to set aside a judgment for fraud upon the Court); 11 Wright & Miller §2851 at 229 (same). The first additional avenue mentioned is an independent action. It is a narrow avenue. The Supreme Court has held that "under the Rule, an independent action should be available only to prevent a grave miscarriage of justice." U.S. v. Beggerley, 524 U.S. 38,

47, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998). But the roadway is wide enough to allow Spinney's claim of fraud upon the Court. See: 11 Wright & Miller, §2868 at 399-400; id., §2870, at 415; 12 Moore's §60.81 [1][a]. There is no set time for filing an independent action, although relief may be barred by laches. See: 11 Wright & Miller §2868, at 401-02; 12 Moore's §60.21 [2], at 60-50.

The second procedure for obtaining relief is to invoke the "Inherent Power" of the Court to set aside its judgment if procured by fraud upon the Court. Relief is not dependent on the filing of a motion by a party to the original judgment; the Court may assert this power sua sponte. See: 11 Wright & Miller §2865, at 380; id., at 60-60 (party seeking relief need not have been a formal party to original proceeding); id., at 60.21 [4][f]; id., §60.62, at 60-195. There is no time limit for such proceedings nor does the doctrine of laches apply. (Emphasis Added) See: Bulloch v. United States, 763 F.2d 1115, 1121 (10th Cir.1985) (En Banc). The substance of Spinney's pleading should control, not the label. The Court should construe the Motion either as an independent action or, because "[t]here are no formal requirements for asserting a claim of fraud on the Court," 12 Moore's §60.21 [4][f], at 60-60, as a pleading invoking the Court's Inherent Power to grant relief for fraud upon the Court. Spinney's claim of fraud upon the Court should not be dismissed on procedural grounds. The Bulloch, Court described such

fraud as follows:

> "Fraud on the Court...is fraud which is directed to the judicial machinery itself & is not, false statements or perjury...It is thus fraud...where the impartial functions of the Court have been directly corrupted."

In Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1267 (10th Cir.1995); The Court said:

> "Fraud on the Court, whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the Court. A proper balance between the interests underlying finality on the one hand & allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing--what can properly be characterized as a deliberate scheme to defraud-before relief judgment is appropriate."

In the instant case, Spinney, has clearly demonstrated and support with empirical evidence that the actions of: AUSA: Timothy Feely, epitomized conscious wrongdoing by committing Fraud upon the Court, by not indicting Spinney under Title 18 U.S.C. §2 Aiding & Abetting in which Mr. Spinney is serving a lenthy sentence of well over twenty (20) years for a charge he was not even indicted for by a Federal Grand Jury.

See EXHIBIT: U.S. v. Spinney, CR-93-10345-DPW., Indictment.
APPENDIX # 1-19 .

THE SENTENCING COURT LACKED JURISDICTION TO IMPOSE THE SENTENCE BEYOND THAT CONTEMPLATED BY THE CHARGES TO THE FEDERAL GRAND JURY WHICH SPINNEY WAS NOT INDICTED FOR TITLE 18 U.S.C. §2, AIDING & ABETTING IN VIOLATIONS OF STIRONE V. U.S., 361 U.S. 212, 217, 80 S.Ct. 270,__,4 L.Ed.2d 252 (1960); BLAKELY V. WASHINGTON, 542 U.S.___, APPRENDI V. NEW JERSEY, 530 U.S. 466 (2000); UNITED STATES V. R.L.C., 530 U.S. 291 (1992) & DUE PROCESS, 5th, & 6th AMENDMENT OF THE U.S. CONSTITUTION

Because the government failed to indict Spinney in Title 18 U.S.C. §2, Aiding & Abetting, & or file an information charging the factual findings used to enhance Spinney's enormous sentence, the sentencing Court plainly lacked Jurisdiction to impose the enhanced sentence. Hence, upon the ground that the sentence was imposed in violation of the Constitution &--laws of the United States, thus, the Court was without jurisdiction to impose such sentence, and premises his right to present this procedurally tardy claim on Blakely v. Washington, 542 U.S._____(2004), which found that "when a judge inflicts punishment that the jury's verdict did not support & did not allow, thus, the Federal Grand Jury has not found all the facts: (18 U.S.C. §2 In Spinney), "which law makes essential to the punishment," (citation omitted), & "the judge exceeds his property authority." See: Teague v. Lane, 489 U.S. (1989). The opinion in Blakely, established that any fact that increases the upper level or bound on a judge's sentencing discretion is an element of the offense & must be charged in an indictment or information & submitted to a Jury. Spinney, clearly by going to trial, reserved 'all' his rights more than one whom had plead guilty, supporting Spinney's Sixth (6th) Amendment right to trial; 6th Amendment right to be confronted by his accusers; 6th Amendment right to Notice via: indictment; 5th Amendment protection from double jeopardy, & 5th & 6th Amendment(s) Due Process & 14th Amendment Equal Protection of the Law.

Federal Courts as Courts of limited jurisdiction, delving power soley from Article III of the Constitution and from Legislative Acts of Congress. See: Insurance Corp. of Ir., Ltd. v. Compagnie des Bauzities de Guinee, 456 U.S. 694, 701, 102 S.Ct. 2099, 72 L.Ed.2d 492 (1982). Nor can District Courts derive, power to act from the parties. Consequently, neither the government nor Spinney are capable of conferring jurisdiction foundation the Court lacks simply by waiver or procedural default. See: United States v. Griffin, 303 U.S. 226, 229, 58 S.Ct. 601, 82 L.Ed. 764 (1938); ("Since lack of jurisdiction of a Federal Court touching the subject matter of the litigation cannot be waived by the parties, we must upon this Motion examine the contention"); Hertz Corp. v. Alamo Rent-A Car, 16 F.3d 1126, 1131 (11th Cir.1994) ("Subject matter jurisdiction can never be waived or conferred by the consent of the parties") (quoting Latin Am. Property & Cas. Insur. Co. v. Hi-Lift Marina, Inc., 887 F.2d 1477, 1479 (11th Cir.1989); Fitzgerald v. Seaboard Sys. R.R., Inc., 760 F.2d 1249, 1250 (11th Cir.1985). Beacause jurisdictional claims may not be defaulted, a defendant (Spinney), need not show "cause" to justify his failure to raise such a claim. The Seventh Circuit reached a similar result in: Kelly v. U.S., 29 F.3d 1107 (7th Cir.1994). In Kelly, as is urged here in Spinney, supra, the Court considered a Title 28 U.S.C. §2255 collateral attack on a sentence where

the prosecutor failed to timely file the information. The Court concluded that Kelly, was not required to show cause & prejudice to excuse his failure to challenge the District Court's jurisdiction, explaining, "The point of cause & prejudice, we repeat, is to overcome the waiver. But this analysis of course assumes that the error in question is a waivable one. And jurisdiction defects are not." Id., at 1112 (emphasis added). See also: U.S. v. Broadwell, 959 F.2d 242 (9th Cir.1992), where the 9th Circuit, in an unpublished opinion, agreed, stating that "because the error is jurisdictional, the defendant (Spinney), need not show cause & prejudice." Because jurisdictional defects are non-waivable, Spinney need not provide the Court with an excuse adequate to convince it to forgive that "Waiver." The facts of this reveal that the District Court plainly lacked jurisdiction to imposed the enhanced sentence complained of, & Spinney need not show cause & prejudice to collaterally attack the enhanced sentence because jurisdictional claims cannot be procedurally defaulted. Spinney's indictment, conviction & sentence should be vacated & Dismissed with prejudice with the commands & dictates of: the 5th, 6th Amendments of the United States Constitution, Blakely, Apprendi, Stirone, R.L.C., ETC, supra's. Harduvel v. General Dynamics Corp., 801 F.Supp. 597 (M.D. Fla.1992); Rules 60(b)(6): Saving Clause, "Fraud on the Court" offers relief from judgment only to

accomplish justice & only in the most "extraordinary" circumstances. Olle v. Henry & Wright Corp., 910 F.2d 357, 365 (6th Cir.1990) FRCP 60(b)(6) confined to "unusal & extreme situations" as in Spinney, supra. Matter of Emergency Beacon Corp., 666 F.2d 754 (2d Cir.1981). Rodriguez v. Mitchell, 252 F.3d 191 (2d Cir.2001), amended, ___F.3d___(2d Cir.2002). Rodriguez, held that a Rule 60(b) motion challenging the "integrity" of a collateral attack proceeding should not be treated as a second collateral attack on a conviction, even though the motion ultimately seeks to overturn the conviction. Id., at 198-200. Fraud Upon The Court: United States v. Buck, 281 F.3d 1336 (10th Cir.2002):

1. Procedural Issues

Spinney's claim for relief under Rule 60(b)(6) is based on the contention that the AUSA: Feely, whom represents the United States committed fraud upon the Court in not obtaining an indictment for Title 18 U.S.C. §2, Aiding & Abetting, in which Spinney is serving well over twenty (20) years of incarceration in prison for. Before considering the merits of the contention, we address a procedural matter. We hold that a claim of fraud, including fraud upon the Court, cannot be brought under clause (b)(6). As we shall explain, however, the error in labeling the pleading is not fatal because Rule 60(b) permits other means pursuing the relief Spinney seeks. Nevertheless Rule 60(b) authorizes two

other avenues for relief from fraud upon the Court. The rule states that it "does not limit the power of a Court [1] to entertain an independent action to relieve a party (Spinney), from a judgment, order, or proceeding... or [2] to set aside a judgment for fraud upon the Court." Rule 60(b); see 12 Moore's §60.81 [1][b] (distinguishing between an independent action & the inherent power to set aside a judgment for fraud upon the Court); 11 Wright & Miller §2851, at 229 (same). "4,5] The first additional avenue mentioned is an independent action. It is a narrow avenue. The Supreme Court has recently held that "under the Rule, an independent action should be available only to prevent a grave miscarriage of justice." United States v. Beggerly, 524 U.S. 38, 47, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998). But the roadway for (Spinney), is wide enough to allow at least some claims of fraud. See: 11 Wright & Miller §2868, at 399-400; id. §2870, at 415; 12 Moore's §60.81 [1][a]. There is no set time limit for filing an independent action, although relief may be barred by laches. See: 11 Wright & Miller §2868, at 401-02; 12 Moore's §60.21 [2], at 60-50. [6,7] The second procedure for obtaining relief is to invoke the "Inherent Power" of the Court to set aside its judgment if procured--by fraud upon the Court. Relief is not dependent on the filing of a motion by a party to the original judgment; the Court

may assert this power sua sponte. See: Wright & Miller §2865, at 380; id. §2870, at 411; 12 Moore's §60.21 [4][e], at 60-60 (party seeking relief need not have been a formal party to original proceeding) id. §60.21 [4][f]; id. §60.62, at 60-195. There is no time limit for such proceedings, nor does the doctrine of laches apply. See: Bulloch v. United States, 763 F.2d 115, 1121 (10th Cir.1985) (en banc); 11 Wright & Miller §2870, at 412; 12 Moore's §60.21 [4][g]. Apprendi v. New Jersey, 530 U.S. 466 (2000); Spinney, clearly argues that Apprendi, should be read expansively to require that any factor (18 U.S.C. §2) that impacts a defendants (Spinney's) sentence must appear in the indictment & be submitted to the jury & decided unanimously beyond a reasonable doubt. Spinney, recognizes that in: United States v. R.L.C., 503 U.S. 291 (1992), coupled with Apprendi & Blakely, & Stirone, supra's supports Spinney's position.

THE DISTRICT COURT WAS WITHOUT JURISDICTION TO SENTENCE SPINNEY FOR TITLE 18 U.S.C. §2, AIDING & ABETTING BY THE PREPONDERANCE OF THE EVIDENCE TAKING AWAY SPINNEY'S DUE PROCESS & FIFTH & SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

The reasonable Doubt Standard is a "Bedrock Procedural Element Essential to Fairness." Sullivan v. Louisiana, 508 U.S. 275, 113 S.Ct. 2068, 124 L.Ed.2d 182 (1993); In Re Winship, 397 U.S. 358, 363, 90 S.Ct. 1068,__,25 L.Ed.2d 368 (1970). The pleading requirement, which held "the indictment must contain an allegation (18 U.S.C. §2) of every fact which is legally essential

to the punishment to be inflicted." See also: United States v. Reese, 92 U.S. 214, 232-33, 23 L.Ed. 565 (1875). An Indictment missing an "Essential Element" (Title 18 U.S.C. §2) is legal nullity & any conviction based thereon must automatically be vacated. "Calling a particular kind of (fact) (18 U.S.C. §2) an 'Element' carries certain legal consequences." Richardson v. United States, 119 S.Ct. 1707, 1710 (1999). One such consequence is that the defendant: Spinney jury must pass upon & include "ONLY" every element in Spinney's indictment, which precluded: 18 U.S.C. §2, Aiding & Abetting Statute. United States v. Castillo, ___, U.S.))), 120 S.Ct. 2090. The failure to include (18 U.S.C. §2) an "Essential Element" in the indictment is a fundamental, jurisdictional defect that renders any conviction on a defective indictment a nullity. Defendant: Spinney "never" waived his indictment & also went to trial. U.S. v. Bell, 22 F.3d 274, 275 (11th Cir.1994); U.S. v. Meacham, 626 F.2d 503, 509-510 (5th Cir.1980). Because jurisdictional defects are not waivable & cannot be procedurally defaulted, Spinney, need not show cause & prejudice to justify his failure to raise such a claim. Consequently, Plain Error Review is precluded, to the extent that is requires a stringent "Prejudice" analysis. U.S. v. Olano, 507 U.S. 725, 734, 113 S.Ct. 1770,__, 123 L.Ed.2d 508 (1993). "Plain Error" analysis never applies to jurisdictional errors.

Not only does Federal Rules of Criminal Procedure Rule 12(b)(2) provide that defects in the indictment which go to lack of jurisdiction or failure to charge an offense. "Shall be noticed by the Court at any time during or after the proceedings," but even when the defendant (Spinney), has failed to bring jurisdictional error to the attention of the Court, Court's have held that a reviewing Court has an affirmative obligation to correct such jurisdiction error on Habeas review. Harris v. United States, 149 F.3d 1304, 1308 (11th Cir.1998). The United States Supreme Court held: "The Due Process Clause of the Fifth Amendment and the Notice & Jury Trial Guarantees of the Sixth Amendment requires "ANY FACT (other than prior conviction), that increases the penalty of a crime beyond the prescribed statutory maximum must be submitted to a Grand Jury & found by a Trial Jury beyond a reasonable doubt unanimously." The Federal Grand Jury's omission of element: Title 18 U.S.C. §2, Aiding & Abetting Statute from Spinney's indictment has always been regarded as a jurisdictional defect, reversable per se without proof of prejudice. See: Stirone v. United States, 361 U.S. 212, 217, 80 S.Ct. 270,___, 4 L.Ed.2d 252 (1960); Deprivation of right to be tried "ONLY" on charges returned by (Spinney's) Federal Grand Jury "is far too serious to be treated as harmless error." Ex Parte Baine, 121 U.S. at 1213 (1887).

United States v. Gayle, 967 F.2d 483, 485 (11th Cir.1992) (En Banc): United States v. Fern, 155 F.3d 1318, 1324-25 (11th Cir.1998); United States v. Meacham, 626 F.2d 503, 510 (5th Cir.1980); (Objection that indictment fails to charge an offense is a non-waivable jurisdictional defect). The above cases supports Spinney, supra.

PETITION BY SPINNEY TO DISMISS INDICTMENT FOR FAILURE TO CHARGE TITLE 18 U.S.C. §2, AIDING & ABETTING STATUTE IN SPINNEY'S INDICTMENT & FAILURE TO CHARGE A FEDERAL OFFENSE & LACK OF JURISDICTION IN THAT THE INDICTMENT IS VAGUE AND INSUFFICIENT

Petitioner: Spinney, Pro Per In Propria Persona Proceeding Sui Juris, moves for an Order dismissing and/or quashing the indictment as it relates to him & states as follows:

(1) The indictment fails to allege facts which constitutes a criminal offense; (18 U.S.C. §2), etc;

(2) The indictment fails to allege facts which constitutes a criminal offense against the United States of America; (18 U.S.C. §2), etc;

(3) The indictment fails to allege facts which constitute a criminal offense over which this Court has jurisdiction; (18 U.S.C. §2), etc;

(4) The indictment purports to allege certain facts, but fails to state facts which support or constitutes a Federal Offenses or where this Court has Jurisdiction.

(5) The indictment is vague & uncertain & fails to be or contain a plain, concise & definite written statement of the essential facts constituting the offense or offenses sought to be charged; (18 U.S.C. §2), etc;

(6) The indictment states conclusions rather than facts.

(7) The indictment does not adequately & fairly inform defendant: Spinney, of the offense 18 U.S.C. §2 or offenses sought to be charged against him.

(8) Petitioner: Spinney, moves this Honorable Court to dismiss the indictment in that the said Court lacks jurisdiction because of the offense charged is in no way a Federal Offense and no Federal Law was violated, (lack of jurisdiction), since Spinney was not indicted for 18 U.S.C. §2;

(9) Petitioner: Spinney moves this Court to dismiss the indictment for reasons that the said indictment fails to allege facts sufficient to complete an offense via: 18 U.S.C. §2, against the laws of the United States; (Failure to Charge a Federal Offense).

MEMORANDUM OF LAW IN SUPPORT OF PETITIONER: SPINNEY'S MOTION TO DISMISS INDICTMENT FOR--FAILURE TO CHARGE A FEDERAL OFFENSE: TITLE 18 U.S.C. §2, AND LACK OF JURISDICTION IN THAT THE INDICTMENT IS VAGUE AND INSUFFICIENT

Petitioner, Spinney, Pro Per In Propria Persona Proceeding Sui Juris, moves to dismiss the indictment upon the ground that on its face the facts are so vague and uncertain that it fails to inform the accused: Spinney of the nature and cause of the accusation: 18 U.S.C. §2, Aiding & Abetting Statute, and denies Spinney the right to know if a Federal Offense is charged and the Jurisdiction of this Court, if any, it denies Spinney, the privilege of exercising this right to have compulsory process for obtaining witnesses in his factor in that he is unable to ascertain the identity of necessary witnesses for whom process should issue; it denies him assistance of counsel for his defense in that counsel is unable to determine the nature of the acts or transaction alleged with sufficient certainty to research the applicable law, cross-examine witnesses offered by the prosecution or to otherwise

prepare & try the case, all in violations of the Fifth & Sixth Amendments of the United States Constitution & Spinney's Due Process.

Note: Defendant/Petitioner: Spinney's Conspiracy charge was dismissed upon a motion from the government: AUSA: Feely, thus, this case should be dismissed with prejudice, since Defendant: Spinney was NOT indicted for Title 18 U.S.C. §2, Aiding & Abetting, in which Mr. Spinney is 'now' serving a lenthy enormous sentence of well over twenty (20) years for.

See: EXHIBIT: U.S. v. Spinney,
CR-93-10345-DPW.
Indictment.
APPENDIX # **1-19**.

See EXHIBIT: U.S. v. Spinney,
CR-93-10345-DPW.
Judgment & Commitment
Order.
APPENDIX # **20 & 46**.

See EXHIBIT: U.S. v. Spinney,
CR-93-10345-DPW.
Sentencing Transcript
APPENDIX # **21-43**.

The above independent corroboration supports that Mr. Spinney's indictment, judgment & commitment shows that Mr. Spinney WAS NOT indicted for Title 18 U.S.C. §2, Aiding & Abetting Statute. Moreover, Mr. Spinney's Sentencing transcripts independently corroborates that Mr. Spinney, was clearly sentenced for Title 18 U.S.C. §2, Aiding in Abetting Statute. This is clear genuine evidence which supports Spinney's argument.

Congress has expressed its desire that government attorneys comply with state & local federal Court rules governing the practice of law. See: Title 28 U.S.C. §530(a). These ethical norms not only protect the individual but also our system of justice within democracy. In the words of the late: Judge: Burciaga

> "[W]e must understand ethical standards are not merely a guide for the lawyer's conduct, but an integral part of the administration of justice. Recognizing a government lawyer's role as a shepard of justice, we must not forget that the authority of the Government lawyer does not arise from any right of the Government, but the POWER entrusted to the Government. When---Government Lawyers: AUSA: Mr. Feely, with enormous resources at his disposal, abuses this power & ignores ethical standards, he not only undermines the public trust, but inflicts damage beyond calculation to our system of Justice. This alone compels the responsible & ethical exercise of power." VIA: In all three branches of Government: Executive/Legislative/Judicial Branches of Government. Matter of Doe, 801 F.Supp. at 479-80.
>
> Singleton, 165 F.3d 1314 (Kelly, dissenting).

Silence can only be equated with Fraud:

Federal Corp. Insurance v. Merrill, 332 U.S. 380, 92 L.Ed. 10, 68 S.Ct. 1, 175 ALR 1075 (1947). Failure to answer is silence: Silence can only be equated with fraud where there is a legal & moral duty to speak, or when an inquiry left unanswered would be intentionally misleading. United States v. Tweel, 550 F.2d 297 (1977).

TANAKH: To answer a man before hearing him-out is foolish & disgraceful.
Proverbs: 18:13 Page: 1314
(The Jewish Publication Society 1985).

[F]undamental fairness and public confidence in government officials & Court Officers: AUSA: Feely, to be held to: "Meticulous Standards of Both Promise & Performance." Correale v. United States, 479 F.2d 944, 947 (1st Cir.1973).

In 1861, Lord Acton wrote that, "[e]very thing secret degenerates, even the Administration of Justice."

John Emerich Dalberg Acton, Lord Acton and his circle 166 (Abbot Gasquet, ed., 1968).

The above case in Spinney, shows that he was right. Bemis v. United States, 30 F.3d 220, 221 n.1 (1st Cir.1994); In general, those decisions are rooted in the principle that, "Fundamental Fairness & Public Confidence In Government Officials Require That The Government, supra, Be Held To 'Meticulous Standards of Both Promise & Performance.'" E.g., Kasuri v. Elizabeth Hospital Medical Center, 897 F.2d 845, 852 (6th Cir.1990).

SUPERVISORY POWERS OF THIS COURT
THE JUDICIAL BRANCH OF THE UNITED STATES GOVERNMENT

United States v. Kouri-Perez, 187 F.3d 1, 7-8 (1st Cir.1999); ("The challenged sanction is expressly predicated on the "Inherent Powers" of the Federal Courts, the Judicial Branch of the U.S. Government. Article III Courts were imbued with an array of "Inherent Powers" in performing their case-management functions from the moment of their establishment.

United States v. Horn, 29 F.3d 754, 759 (1st Cir.1994); (Citing: United States v. Hudson, 11 U.S. (7 Cranch) 32, 34, 3 L.Ed. 259 (1812)); See also: Chambers v. NASCO, Inc., 501 U.S. 32, 43-44, 11 S.Ct. 2123, 115 L.Ed.2d 27 (1991); Link v. Wabash R.R. Co., 370 U.S. 626, 630-31, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962). These implicit powers include the judicial authority to sanction counsel for litigation abuses which threaten to impugn the U.S. District Courts, U.S. Court of Appeals & The Supreme Court of the United States's------integrity or disrupt its efficient management of the proceedings. See: Chambers, 501 U.S. at 43, 111 S.Ct. 2123 (noting that inherent powers of the U.S. Courts, supra, powers include authority to "control admission to its bar & to discipline attorneys who appear before it") Roadway Express, Inc. v. Piper, 447 U.S. 752, 766, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) ("The Power of the Courts over members of its bar is at least as great as its authority over litigants.") Thus, Courts may invoke their Supervisory Powers to implement a remedy for violation of recognized rights, to preserve judicial integrity, or deter illegal conduct See Id., see also: United States v. Santana, 6 F.3d 1, 10 (1st Cir.1993); The U.S. Courts, did not invoke its supervisory powers, but it did voice lingering concerns about "Fundamental Fairness" & "Fair Play." U.S. v. Stokes, 947 F.Supp. at 557. Such a step is reserved for cases such as this one

in: Spinney, supra, "serious and blantant prosecutorial misconduct that distorts the integrity of the judicial process." United States v. Giorgi, 840 F.2d 1022, 1030 (1st Cir.1988) (citation omitted). See: Chambers v. NASCO, Inc., 501 U.S. 32, 47, 111 S.Ct. 2123, 2134, 115 L.Ed.2d 27 (1991)...In what is not necessarily an exhaustive listing, the Court has recognized three purposes which the supervisory power may be dedicated:

(1) "to implement a remedy for violation of recognized rights; (Petitioner: Spinney's Due Process, etc.);

(2) to preserve judicial integrity;

(3) as a remedy designed to deter illegal conduct." Hasting, 461 U.S. at 505, 103 S.Ct. at 1978; (internal citation omitted). Invoking this third theme, we have warned that we will consider unleashing the Supervisory Power in criminal cases "[w]hen confronted with extreme misconduct & prejudice," in order "to secure enforcement of 'better prosecutorial practice & reprimand of those who fail to observe it.'" United States v. Osorio, 929 F.2d 753, 763 (1st Cir.1991) (quoting: United States v. Pacheco-Ortiz, 899 F.2d 301, 310-11 (1st Cir.1989)). Bolling v. Sharpe, 347 U.S. 497, 500 (1954) (holding that the Due Process Clause of the Fifth Amendment places the same restrictions on actions by the Federal government that the Equal Protection Clause of the Fourteenth Amendment places on the State governments).

See: Francis Bacon, Of Judicature, In Essays 316 (1654) ("And let no man weakly conceive, that just laws and true policy have any antipathy; for they are like the spirits & sinews, that one moves with the other. Let judges also remember that King Solomon's throne was supported by lions on both sides: let them be lions, but yet lions under the throne; being circumspect--that they do not check or oppose any points of Sovereignty. Let not judges also be ignorant of their own right, as to think there is not left to them, as a principle part of their office, a wise use & application of laws.")

As Judge Bruce Selya so aptly put--it, "when...the legislative trumpet sounds clearly, Courts are duty bound to honor the clarion call." United States v. Jackson, 30 F.3d 199, 204 (1st Cir.1994); Obedience to the Constitutional expression of the Congressional will is the hallmark of the Federal Judiciary a vital aspect of its professionalism & its role in our system of government. Cooper v. Aaron, 358 U.S. 1, 78 S.Ct. 1401 (1958); "No Legislator, Executive or Judicial officer can war against the United States Constitution without violating his/her undertakings to support it."

CONCLUSION

WHEREFORE, for all of the above stated reasons with supportive case law authorities Appendix/Exhibits: Spinney's Indictment/Judgment & Commitment/ Sentencing Transcripts, of the record, Spinney, requests that this Honorable Court grant this Motion/Claim/Affidavit & grant a hearing & or immediate dismissal of the indictment & or conviction to avoid additional 'Miscarriage of Justice.' This Motion Is In The Interest of Justice.

Respectfully Submitted By
Petitioner/Claimant/Affiant:

Jeffrey Warren Spinney

Pro Per
In Propria
Persona
Proceeding
Sui Juris

Jeffrey Warren Spinney
15468-018
FCI McKean
P.O. Box 8000
Bradford, Pennsylvania
16701

Signed under
18 U.S.C.
§1623, & under
28 U.S.C.
§1746.

August 15, 2005

CERTIFICATE OF SERVICE

I, Jeffrey Warren Spinney, hereby certify that the above & the following was sent via: United States Mail, Postage Prepaid, on this 15 day of August, 2005, via: Caldwell v. Amend, 30 F.3d 1199 (9th Cir.1994); Houston v. Lack, 487 U.S. 266, 101 L.Ed.2d, 108 S.Ct. 2379 (1988); Prisoners' Pro Se Motion Judgment N.O.V. was deemed filed on date Motion was placed in Prison's "Legal Mail Box" as opposed to date of its receipt by the Court Clerk, AUSA, Respondents, also sent via: Lema v. U.S., 987 F.2d 48, 54 n.5 (1st Cir.1993); Boag v. MacDougall, 454 U.S. 364, 70 L.Ed.2d 551, 102 S.Ct. 594 (1982); Hughes v. Rowe, 449 U.S. 5, 9, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (Per Curiam); Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (Per Curiam); Pro Se litigants pleadings are to be construed liberally and held to less stringent standards than formal pleadings drafted by lawyers.
Sent to the following:

Honorable: Douglas P. Woodlock,
U.S. District Court Judge
District of Massachusetts
United States Courthouse
1 Courthouse Way
Boston, Massachusetts
02210

AUSA: Timothy Feely,
U.S. Attorneys Office
District of Massachusetts
Suite 9200, 9th Floor
United States Courthouse
1 Courthouse Way
Boston, Massachusetts
02210

Tony Anastas,
U.S. Clerk of Courts
Clerk's Office
Suite 2300
United States Courthouse
District of Massachusetts
1 Courthouse Way
Boston, Massachusetts
02210

Jeffrey Warren Spinney

Pro Per
In Propria
Persona
Proceeding
Sui Juris

Jeffrey Warren Spinney
15468-018
FCI McKean
P.O. Box 8000
Bradford, Pennsylvania
16701

Signed under
18 U.S.C.
§1623 & under
28 U.S.C.
§1746.